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No. 82-217

In the Supreme Court of the United States

October Term, 1982

SHIRLEY STOVER, et al.,

Petitioners,

v.

MELANIE HANSON JOHNSON, GERARD STANLEY JOHNSON, et al., and JACQUELINE N. RAU,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This is an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1). The questions presented are:

1. Is the district court's order expressly prohibiting respondent and all other members of the putative mandatory class from settling or prosecuting their pending state court claims for punitive damages an injunction from which an appeal may be taken under 28 U.S.C. § 1292(a)(1)?

2. Is the district court's order expressly prohibiting respondent and all other members of the putative mandatory class from settling or prosecuting their state court claims for punitive damages an injunction to stay proceedings in a state court that contravenes the Anti-Injunction Act, 28 U.S.C. § 2283?

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BRIEF IN OPPOSITION

Respondent, Jacqueline N. Rau, requests that this Court deny the petition of Shirley Stover, *et al.*, for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

On January 25, 1982, the district court, Honorable Scott O. Wright presiding, entered the order from which respondent, Jacqueline N. Rau, appealed. Pet. App. D; *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo. 1982). Petitioners' repeated statement, Pet. 5, 8, that the district court did not issue any injunction is flatly incorrect. At no point do petitioners even mention the central language of this order—the district court's express injunction against settlement or prosecution by individual plaintiffs of their state court claims for punitive damages. In its order, the district court stated:

> Those claimants who want to exact payment for allegedly punishable acts must forego the settlement process and await the trial of the punitive damage issues.

Pet. App. D, 60a; 93 F.R.D. at 428. Even Judge Heaney, who dissented from the decision of the Eighth Circuit, acknowledged that this aspect of the district court's order constituted an express injunction appealable under 28 U.S.C. § 1292(a)(1). Pet. App. A, 19a-20a, 34a n.16-17; *In re Federal Skywalk Cases*, 680 F.2d 1175, 1185, 1192 n.16-17 (8th Cir. 1982).

The district court's order did, in fact, halt settlement negotiations in the state court proceedings. Prior to the order, defendants committed a minimum of 151 million dollars in insurance coverage to settle claims. J. App. Ex. 12, 53.* As of the date of the order, 123 claims had been

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* The citation "J. App. Ex." refers to the appendix filed by respondents Melanie Hanson Johnson and Gerard Stanley Johnson in the United States Court of Appeals for the Eighth Circuit.

settled for approximately 18.5 million dollars. Pet. App. A, 3a; 680 F.2d at 1177 n.5.

In her state court cases, Ms. Rau, whose husband was killed and who was injured herself when the skywalks collapsed, made a detailed written settlement demand to defendants. Counsel for Ms. Rau and defendants met during December, 1981. These negotiations were moving forward until the district court entered its order. Defense counsel thereupon terminated the settlement discussions with Ms. Rau. Understandably, defendants were unwilling to settle with Ms. Rau unless they could obtain a release of all of her claims, including her claims for punitive damages. Affidavit of Thomas P. Sullivan, attached hereto as Appendix A (hereinafter "R. App. A.").

On February 2, 1982, a week after the district court's order, counsel for several major defendants filed a notice that they would recommence settlement negotiations, but would "only settle such claims in return for a full release of all claims, including a waiver of any claim for punitive damages." J. App. Ex. 33, 1. On February 10, Petitioners filed a motion *in limine* in response to the defendants' notice in which petitioners themselves recognized the injunctive effect of the district court's order when they stated, J. App. Ex. 39, 2-3:

> The short answer to the defendants' Notice is that this Court's Order and Memorandum certifying the class forbids individual settlements of claims for punitive damages . . . . As the Court emphasized, settlements of punitive damage claims must be prohibited . . . .

No settlements were negotiated between January 25, 1982, the date of the district court's order, and June 7, 1982, the date of the Eighth Circuit's opinion vacating that order. Affidavit of Michael Waldeck, August 23, 1982,

at 1. Defendants declined even to discuss settlement with Ms. Rau. R. App. A.

In its opinion, the entire panel of the Eighth Circuit, including Judge Heaney, concluded that the district court's order "expressly prohibited members from settling their punitive damage claims." Pet. App. A, 9a, 19a; 680 F.2d at 1180, 1185 n.1. The majority also noted that "the substantial effect of the order . . . enjoined the state plaintiffs from pursuing their pending state court actions on the issues of liability for compensatory and punitive damages and the amount of punitive damages." Pet. App. A, 9a; 680 F.2d at 1180. On these facts, the Eighth Circuit held, with agreement from Judge Heaney in dissent, that the district court granted an injunction appealable under 28 U.S.C. §1292(a)(1). Pet. App. A, 10a, 19a-20a, 33a-34a; 680 F.2d at 1180, 1185, 1191-92 n.16.

The majority also held that the district court's injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283. The majority expressly rejected petitioners' argument that the injunction was necessary in aid of the district court's jurisdiction so as to fall within that exception to the Anti-Injunction Act. Pet. App. A, 12a-16a; 680 F.2d at 1181-83.

Since the Eighth Circuit's decision, the effect of which this Court refused to stay, 47 additional cases have been settled for over 5 million dollars. Affidavit of Michael Waldeck, August 23, 1982, at 1. On August 18, 1982, counsel for Ms. Rau met with representatives of defendants and continued settlement negotiations. Since then, counsel for Ms. Rau and defendants have exchanged correspondence concerning the offer in an ongoing effort to settle her case. R. App. A. Indeed, even the sole representative plaintiff, petitioner Ms. Stover, was able to negotiate a substantial settlement of all of her claims shortly after the petition was filed with this Court. *In Re Federal Skywalk Cases*, No. 81-0945-A-CV-W-5 slip op. at 5 (W.D. Mo. Sept. 17, 1982).

REASONS FOR DENYING THE WRIT

The district court expressly prohibited class members from settling or prosecuting their state court claims for punitive damages. The entire panel of the Eighth Circuit agreed that the district court's order was appealable as of right because it had the substantial effect of an injunction against pending state court proceedings. By so ruling, the Eighth Circuit did not expand the scope of interlocutory orders appealable under 28 U.S.C. § 1292(a)(1). On Ms. Rau's proper appeal, the majority correctly vacated the district court's order because it constituted an injunction against state court proceedings that did not fall within any exception to the Anti-Injunction Act.

The petition should be denied not only because the decision below was clearly correct, but also because petitioners present no question which is important or which involves a conflict with any decision of this Court or among the circuits.

ARGUMENT

I.

THE DISTRICT COURT'S ORDER IS APPEALABLE UNDER 28 U.S.C. § 1292(a)(1).

Every member of the Eighth Circuit panel, including Judge Heaney in dissent, agreed that the district court's order expressly enjoined members of the putative class from settling their state court punitive damage claims. Pet. App. A, 9a, 19a-20a; 680 F.2d at 1180. Directly contrary to petitioner's contention, the majority held, and Judge Heaney agreed, that the district court's interlocutory injunction was appealable under 28 U.S.C. § 1292(a)(1). Pet. App. A, 9a-10a; 680 F.2d at 1180. Thus, the rec-

ord simply does not present the question posed by petitioners, *i.e.*, whether certification of a mandatory class *always* constitutes an injunction that is appealable as of right. For this reason alone, the petition should be denied. *Tyrrell* v. *District of Columbia*, 243 U.S. 1, 4 (1917).

Moreover, the Eighth Circuit's holding falls well within the bounds of precedent established by this Court and other circuit courts.* This Court has held that the determination of whether an order is an appealable injunction depends upon the substantial effect of the order rather than its terminology. *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U.S. 188, 191-92 (1942). An order which has the effect of enjoining or staying any proceeding before another court is appealable as of right under 28 U.S.C. § 1292(a)(1). *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775, 779 (3d Cir. 1975); *United States* v. *Dorgan*, 522 F.2d 969, 971 n.1 (8th Cir. 1975); *In re W. F. Hurley, Inc.*, 553 F.2d 1096, 1100-01 (8th Cir. 1977); *Codex Corp.* v. *Milgo Electronic Corp.*, 553 F.2d 735, 737 (1st Cir.), *cert. denied*, 434 U.S. 860 (1977); 9 *Moore's Federal Practice* ¶ 110.20[1] at 235 (1980). *See, General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430, 433 (1932); *Jenkins* v. *Blue Cross Mutual Hospital Ins., Inc.*, 538 F.2d 164, 166 n.2 (7th Cir.), *cert. denied*, 429 U.S. 986 (1976).

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* Petitioners assert that the Eighth Circuit's holding conflicts with *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978), and *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). The order at issue in *Gardner* only *denied* a motion for class certification; no injunction was issued. 437 U.S. at 479-80. In *Coopers & Lybrand*, again the order in dispute only *decertified* a class. This Court was solely concerned with the issue of whether an order decertifying a class was "final" under 28 U.S.C. § 1291 because of its alleged "death knell" effect. 437 U.S. at 464-66.

Indeed, this Court has held that a district court order rejecting a consent decree might have the "serious, perhaps irreparable, consequence" of denying parties their right to settle their dispute on mutually agreeable terms thus rendering the order appealable under 28 U.S.C. § 1292 (a)(1). *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 87-89 (1981). Here, the district court expressly prohibited the parties from litigating or settling their state court claims for punitive damages, and as a practical matter precluded them from settling at all.

II.

THE DISTRICT COURT'S ORDER CONTRAVENES THE ANTI-INJUNCTION ACT, 28 U.S.C. § 2283.

This Court has repeatedly held that the Anti-Injunction Act, 28 U.S.C. § 2283, constitutes an absolute prohibition against federal court injunctions of state court proceedings, absent the applicability of an enumerated exception, and that this prohibition applies if there is even any doubt as to the propriety of such an injunction. *Atlantic Coast Line R.R.* v. *Locomotive Engineers*, 398 U.S. 281, 286-87, 297 (1970), *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977). Thus, unless an enumerated exception applied, the Eighth Circuit's decision vacating the district court's order was mandated by the Anti-Injunction Act. Pet. App. 12a; 680 F.2d at 1182.

Petitioners claim that the district court's order was necessary in aid of its jurisdiction so that it falls within an exception to the Anti-Injunction Act. However, as the Eighth Circuit correctly pointed out, both the federal and the state court proceedings are *in personam* actions for money damages. In 1922, this Court held that a federal action brought to enforce a personal liability does not impair or defeat the jurisdiction of the state court in which a prior action for the same cause is pending. *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 230 (1922). This

opinion was recently reaffirmed by a plurality of this Court in *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 641-42 (1977). Thus, the state proceedings which the district court's order enjoined did not impair its jurisdiction over the class action and the district court's injunction was not necessary in aid of its jurisdiction.

Petitioners assert that this case is analogous to an interpleader proceeding under Fed.R.Civ.P. 22, a procedure often used by an insurer which concedes liability on a policy, deposits the proceeds with the Court and submits conflicting and mutually exclusive claims to the proceeds for resolution by the Court and claimants.* The Eighth Circuit soundly answered this argument in its opinion.

> The analogy is based on the premise that the possibility of defendants being required to pay only one punitive damage award is comparable to the limited fund concept underlying federal interpleader. That premise is erroneous. 'Federal interpleader jurisdiction de-

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* This analogy involves petitioners' claim that defendants lack sufficient assets to pay all the damages prayed for in the *ad damnums* of the victims. Petitioners' claim is based on an allegation of the Hyatt Corporation in a declaratory judgment suit that Hyatt brought against 26 insurance companies to determine the amount of its insurance coverage and the order of payment by various insurers. Pet. 3 n.4. Hyatt asserted that the aggregate compensatory and punitive damages *alleged* by plaintiffs exceeded all defendants' aggregate insurance coverage. Pet. 3. Petitioners have adduced no evidence that the *actual value* of plaintiffs' claims exceeds the defendants' combined insurance coverage of $333,000,000 and their assets, including the undisclosed assets of defendants Hyatt Corporation and Hallmark Cards. Petitioners have thus failed not only to justify the district court's injunction, but also to establish the existence of a limited fund that might support certification of a mandatory class action pursuant to Rule 23(b)(1)(B). *In Re: Northern District of California, Dalkon Shield IUD Products Liability Litigation*, Nos. 81-4648, 81-4649, 81-4650, 81-4651, 81-4652, 81-4653, 81-4654, 81-4655, 81-4656, slip op. 6-8 (9th Cir. June 18, 1982.)

> pends on identifiable property or a limited fund or pecuniary obligation, and it is not proper to predicate jurisdiction on the mere potential to recover damages for pecuniary injury.' *Murphy* v. *Travelers Insurance Co.*, 534 F.2d 1155, 1159 (5th Cir. 1976), *citing Wallach* v. *Cannon*, 357 F.2d 557 (8th Cir. 1966).
>
> In the present case the class has an uncertain claim for punitive damages against defendants who have not conceded liability. The claim does not qualify as a limited fund which is a jurisdictional prerequisite for federal interpleader. Without the limited fund there is no analogy to an interpleader and no reason to treat the class action as an interpleader for purposes of the Anti-Injunction Act.

Pet. App. A, 13a; 680 F.2d at 1182.

Because the district court's order does not fall within any exception to the Anti-Injunction Act, it was properly vacated by the Eighth Circuit.

CONCLUSION

Respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT OF THOMAS P. SULLIVAN

Thomas P. Sullivan, on oath, certifies that the matters contained on pages 3 to 4 of the attached brief are true.

.....
THOMAS P. SULLIVAN

Subscribed and Sworn to
before me this ..... day
of ...., 1982.

.....
Notary Public